Supreme Court of the United States

OCTOBER TERM, 1950

No. 399.

JACK H. BREARD,

Appellant,

against

CITY OF ALEXANDRIA,

Appellee.

BRIEF IN BEHALF OF NATIONAL ASSOCIATION OF DIRECT SELLING COMPANIES, AS *AMICUS CURIAE.*

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Counsel for National Association of Direct Selling Companies, as Amicus Curiae.

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BRIEF IN BEHALF OF NATIONAL ASSOCIATION OF DIRECT SELLING COMPANIES, AS *AMICUS CURIAE.*

This brief is filed pursuant to written consent of the parties hereto, in the interest of the National Association of Direct Selling Companies, an incorporated trade association.

Identification of *Amicus Curiae.*

The National Association of Direct Selling Companies was organized in 1914 and incorporated under the laws of the State of Minnesota in 1946. Its active membership consists entirely of persons, firms and corporations engaged in selling a wide variety of merchandise items through the method or form of distribution commonly known as "direct selling". Distinguishing this method of distribution from other forms is the fact that sales are made at retail through

persons calling at the homes of prospective purchasers and doing this traditionally without prior invitation or appointment.

This association has 151 active members which is part of a total of approximately 4,000 direct selling companies in the United States. Its membership represents approximately 25% of the volume of sales in the entire direct selling field and presents a good cross section of that field. With but few exceptions, these concerns have nation-wide distribution. Many have branch production or marketing locations distributed throughout the country.

Merchandise lines handled are almost coextensive with the consumer goods field. The most prevalent lines are packaged food specialties, clothing, toilet articles, kitchenware and cutlery, aluminum ware, household appliances, household furnishings, household and agricultural insecticides, household chemicals, soaps and cleansers, brushes and other cleaning equipment, nursery stock, books, paper specialties and printed matter.

The direct selling field as outlined herein does not include such items as insurance, industrial or commercial supplies, equipment or machinery, motor vehicles or newspaper circulation sales. Many of these non-included items are also vitally affected by the outcome of this litigation.

Total annual sales in direct selling upon careful estimation, are somewhere near two billions of dollars, of which the membership of this association accounts for about five hundred millions of dollars. Thus direct selling is in the area of small business. The largest concern in the field last year had annual sales of between sixty and seventy million dollars. Upon a fair and conservative estimate it may be said that over 75% of the 4,000 odd companies average sales of less than two hundred thousand dollars a year.

Except for sales volume figures within this association, all industry figures used are based upon cross section surveys, estimates and deductions from long observation and extensive familiarity with the subject.

Interest of *Amicus Curiae* in this Litigation.

Except for the group which this association represents, the direct selling method of distribution is largely unorganized. There are a few small trade associations in the field which, however, limit themselves in each case to a single commodity or commodity type line.

Upon a carefully considered and conservative estimate, there are operating in the United States between six and seven million dealers and salespersons who operate full or part time. They do the actual selling and are persons of very small capital or means. They are totally unorganized.

The National Association of Direct Selling Companies is, therefore, the only organization in a position to speak broadly on behalf of the business concerns and salespeople most vitally to be affected by the decision in this case. It is one of the purposes of this brief to bring to the court information as to the great number of persons who may be affected by this litigation—these six million or more who depend in whole or in part upon direct selling for their livelihood. It is a further purpose of this brief, most earnestly, to urge the court to recognize that the ordinance here involved is but one of the most recent and most vicious examples of the never ending efforts of short sighted provincialism to build trade barriers around local communities, in the mistaken belief that in so doing, their local self interests may be served. In supporting the urged conclusion that this ordinance violates the commerce and the due process clauses of the Federal Constitution, it is believed

that it will be helpful to present a review of some of the pertinent commonly known facts as to the place of direct selling in the national distribution system to review certain history and background facts concerning this type of ordinance and then to discuss the basis upon which it is urged that the ordinance has the unconstitutional incidence mentioned.

Naturally any local obstruction which deprives these six million salespersons of an opportunity to carry on their business is of direct and vital interest to the members of this association as well as other concerns in the direct selling field. Since whatever obsruction strikes down the calling of these people also strikes down and destroys the business of the direct selling concerns with which they are connected, this ordinance strikes at the very existence of the entire industry all the way from production to retail distribution.

These salespersons represent a mere token minority in the communities where they work, not only in business, but in influence. They are totally unorganized. Because of their connection with a non-resident business enterprise, they are confronted with the organized opposition of local retail business interests supported by the local press and backed by local police and police courts.

The type of ordinance before the court is almost exclusively found in provincial communities and in the non-industrial states. They abound in municipalities where the dominant influence in city government is that of local retailing. It originated in that type of community and stayed there—for one reason only—the prevalence there and nowhere else of the overwhelming local retail influence. The classification is made only to invite attention to a

characteristic inherent in such communities which seems to be relevant to the constitutional issues in this litigation.[1]

Importance of Direct Selling in National Distribution.

Direct selling definitely promotes the general welfare of the people of the nation as a whole in the following respects.

FIRST, it is the primary training ground for salesmanship not only in direct selling but in selling in all fields.

SECOND, it provides a means for livelihood or augmentation of insufficient income for millions of persons of little or no capital or resources.

THIRD, it is practically the only area of gainful activity for persons who on account of age, physical condition, or other circumstances, are unemployable.

FOURTH, during times of an oversupply of manpower, selling in this field helps to fill the unemployment gap, since without regard to economic conditions, selling connections in a wide variety are always available.

FIFTH, in respect to new merchandise it has been and now is, the pioneering agency for all other methods of distributions.

SIXTH, it promotes improvement in the quality of merchandise.

SEVENTH, this positive type of sales effort increases business, employment and living standards.

EIGHTH, it is a convenience and a service to purchasers.

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[1] "The average population record of the communities listed by this association as having adopted this ordinance is approximately 3,000 persons each."

That direct selling is an important part of the national distribution system is testified to by Hon. Charles Sawyer, United States Secretary of Commerce, a disinterested observer, in a statement on Page 35 of the October, 1950 issue of *Opportunity Magazine* published at 28 East Jackson Boulevard, Chicago 4, Illinois, as follows:

> "Direct selling has always had an important place in American life. In the early days of this country, when lack of transportation prevented our citizens from moving easily to central market places, the itinerant merchant fulfilled important social as well as economic functions. He brought into isolated homes not only cloth, needles, thread, knives and other small necessities and satisfying minor luxuries, but he also brought in news of the outside world.
>
> "Today direct selling is more specialized. Most direct salesmen limit themselves to a single line of products such as brushes, books, or hosiery, and the names 'Fuller,' 'Britannica' and the trademark 'Real Silk' have all become household words.
>
> "Direct selling is important to small businesses. Many new enterprises are established every day in all sections of this country. Not being in a position to start off with extensive advertising budgets, many owners of newly created businesses rely on direct selling to develop a market for their products. The salesman who has had experience with door-to-door selling of new products knows the importance of the human side of business and he knows that it takes more than a good product to close a sale.
>
> "Initiative, integrity, ingenuity and a bit of showmanship are essentials to effective salesmanship. This is especially true in direct selling where the salesman must, as a rule, compete with established merchants, nationally-known goods, and nationwide advertising. If, with the help of a good product and a bit of luck, the door-to-door salesman lands an

order, he has the satisfaction of knowing that he is following the American business tradition of starting small, competing successfully with all comers, and—by making more sales—growing bigger."

While not ordinarily considered as a part of the direct selling system, attention is invited to the fact that thousands upon thousands of farmers dispose of various types of farm produce through local house to house selling. This includes such items as meat, eggs, vegetables, fruit, honey, milk and other items.

Another area of business activities which is not customarily thought of in connection with direct selling is local retail business activities involving the sale of automobiles, household appliances, oil burners, bakery goods, milk, ice and newspapers.

In most localities electrical appliances, sewing machines, vacuum cleaners, washing machines and similar important commodities dealt in by local stores are by them sold locally through their own house to house sales operators.

Having an important place in the national distribution system, it follows that the litigation now before the court relates to a matter of substantial national interest.

Interstate Trade Barriers

During the years preceding 1940, particularly during the depression years, the setting up of interstate trade barriers of one kind or another reached such proportions that the situation began to receive considerable nation-wide attention.

In recognition of its seriousness, the Council of State Governments in April, 1939 held at Chicago a national conference on interstate trade barriers. This conference

led to the establishment by the Seventy-Fifth Congress, Second Session, of Temporary National Economic Commission, made up of representatives from the United States Senate and House of Representatives, the Secretaries of State, Justice, Agriculture, Commerce and Labor, and certain interested federal agencies. Extensive hearings were called and held in Washington, March 18th to 23rd, inclusive, in 1940. The writer of this brief, having had about thirty years of close connection with the direct selling field, on the nation-wide level, was called as a witness by counsel for the Commission.

Part 29 of the printed record of the Hearings relates to interstate trade barriers. Types of trade barriers considered included the type of ordinance here under consideration, as well as other trade barriers applicable to direct selling, including those requiring licenses, bonds, permits, finger printing, photographing, zoning, restriction of hours, compulsory waiting periods, daily health examinations and other obstructions by way of state and local legislation.

In the case of *Nippert* vs. *City of Richmond*, 327 U. S. 416 (1946), at Page 430, Footnote 21, this Court referred to the Hearings before Temporary National Economic Committee, Part 29, Pages 15965-15987, and to Exhibit No. 2394 (not included in the printed Hearings), saying

> "but as to the different types of statutes and ordinances designed to favor local business as against itinerants, solicitors and peddlers and 'gypsy truckers' see Hearings,"

referring to the Hearings cited above.

The Hearing Record cited above overwhelmingly supports the claim now being made that the real purpose and effect of this type of ordinance is to erect interstate trade barriers for the competitive benefit of local retailers.

Secretary of Commerce, Harry L. Hopkins, in a letter addressed to Senator O'Mahoney, Chairman of Temporary National Economic Committee, at the opening of the Hearings, March 1, 1940, said in part as follows:

> "* * * During the past few years, the problem of interstate trade restrictions has grown to be a serious threat to the economic life and business well being of our country. It has resulted in loss of business generally and in many cases has impaired the traditional American system of free trade and enterprise. * * *
>
> * * * A labyrinth of states laws and administrative regulations has circumscribed the millions of business transactions in interstate commerce, resulting in a slow strangulation of our trade development. * * *"
>
> Temporary National Economic Committee Hearing, Part 29, Pages 15736-7.

That this "Balkanization" trend still continues is apparent from the three following representative examples which have occurred since the Temporary National Economic Committee Hearings were held:

> (1) An undated recently issued mimeographed circular sent out to the retail photography trade contained the following matter:
>
> "The biggest problem facing eight out of ten portrait studios today, and probably 100% of those located in the smaller communities, is itinerant competition * * *.
>
> A second alternative is that of local license ordinances. These can be put into effect by a small local group or even, by one determined photographer, provided the local authorities are complaisant and cooperative. We have a form of such ordinance, about

the best of its kind, which we supply to members who want it. At the same time we make no bones about telling them frankly that in the final analysis every such ordinance is unconstitutional, and can and will be overthrown in court by the first itinerant who is willing to spend a little time and money on the effort. All we can do is supply the ordinance. * * * Yet a local ordinance is a good thing on the books because it does act as a deterrent to small itinerants, who prefer to move on to an unprotected community.

* * * * * *

So the local ordinance is also no immediate cure or palliative. In a few communities it can be put into effect overnight. More frequently it takes weeks, if not months, is often unenforced and, in the end, is no lasting assurance of protection. I write this with great regret because, as I think you know, through my magazines over a period of many years I think I have done more to sponsor the movement toward local ordinances and state laws than any other person in the industry."

The aforesaid mimeograph was issued under the heading, "Itinerant Competition" and was distributed over the name of the Executive Manager, of *The Photographer*, which is claimed to be the official journal of the Photographers Association of America. The address is 520 Caxton Building, Cleveland 15, Ohio.

The "small itinerant" who by these means is compelled to move on to some so-called "unprotected community" is the small operator who cannot afford the luxury of litigation.

2. A second illustration of the interest of competitors in the fostering of obstructive legislation is found in the January 15, 1951 issue of *Modern Stationer*, a trade maga-

zine in that particular commodity field, wherein the following appears on page 17:

> "* * * The measure was emphatically supported by retailers * * *. In many localities the license practice involved has been in effect for a number of years serving to protect the established store against unreasonable competition."

3. Another recent illustration of local activity of this kind occurred at Casper, Wyoming, which, in 1947, had passed a nuisance ordinance. Shortly thereafter 24 retailers in a one-quarter page advertisement offered a $25 reward for information leading to the arrest and conviction of persons violating the ordinance.

The first two of the three preceding examples involved license ordinances, rather than the nuisance type ordinance, but they are included since their purpose and effect are no different than if they had been nuisance ordinances of the Green River type.

The nuisance ordinance soon came to be looked upon as the discovery of an efficient means not subject to the legal attacks which had been successfully made to other forms of local legislation in the same field. It appeared to be the instrument which would circumvent the commerce clause and which could finally and definitely settle the competitive situation. It was this belief which got it so much support so quickly and over so wide an area.

When enforced it is a practical prohibition of direct selling and more drastic than the other forms of trade barrier legislation which this court has held to be illegal.

Despite great technological and other changes occurring in this country since colonial days, direct selling has maintained an important part in the American way of life.

There is no welfare interest of the public in existence which justifies the destruction of a so important part of the nation's commerce or that justifies the elimination of the means of livelihood for so many people.

Interstate Commerce.

This type of ordinance prohibits interstate commerce and is, therefore, repugnant to Article I, Section 8 of the Federal Constitution.

The origin and rapid spread of this ordinance resulted from the decision of this Court in the case of *Real Silk Hosiery Mills* vs. *City of Portland, et al.*, 268 U. S. 325 (1925). This case struck down a license and bond ordinance as being in violation of the commerce clause of the United States Constitution. Sponsors of legislation to prohibit or burden this method of distribution felt that some other legislative means must be devised to circumvent the effect of the decision just mentioned. The ingenious invention of the type of ordinance now before the Court was the result. This Court's decision showed rather clearly to the interests adverse to house-to-house selling that anything in the nature of a license would come to a bad end in the courts.

Sponsors had hoped that by requiring a bond, as in the *Portland* case, a police purpose would be injected which might be sufficient to defeat the commerce clause protection and avoid the consequences of the decisions of this Court in the case of *Robbins* vs. *Shelby Taxing District*, 120 U. S. 489 (1887), and the long line of so-called "drummer cases" following the latter decision. Sponsors strongly asserted in the *Portland* case that the purpose of the ordinance was to prevent fraud and to protect the consumer, and that, therefore, the commerce question was merely incidental.

The nation-wide depression which started in 1929-30 gave a new impetus to the competitive angle and a further spur to the origin and then the spread of this new type of ordinance.

It is respectfully submitted that it is impossible to look at this situation without reaching a firm conclusion that the public interest is totally absent.

It is hardly necessary to mention that the rule laid down in the *Robbins* case (120 U. S. 489), has been modified so far as certain types of local taxation of interstate commerce are concerned. This Court has recognized certain forms of local taxation of interstate commerce as permissible, but has at all times been very careful to protect the rule which prohibits the imposition upon such commerce of a fixed sum license tax. Attention is invited to *McGoldrick* vs. *Berwind-White Company*, 309 U. S. 33, 55-57 (1940), wherein the Court in upholding a local sales tax, said:

> "It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing interstate sales. See *Robbins* v. *Shelby County Taxing District*, *supra*, 498; *Caldwell* vs. *North Carolina*, 187 U. S. 622, 632. In all, the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with

untaxed sales at retail stores within the state. While a state, in some circumstances, may by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co.* vs. *Seattle,* 291 U. S. 619, 625, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co.* v. *Montana,* 233 U. S. 331, *Magnano Co.* v. *Hamilton,* 292 U. S. 40, with *Schollenberger* v. *Pennsylvania,* 171 U. S. 1; *Robbins* v. *Shelby County Taxing District, supra; Sprout* vs. *South Bend,* 277 U. S. 163. It is enough for present purposes that the rule of *Robbins* vs. *Shelby County Taxing District, supra,* has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate, compare *Robbins* v. *Shelby County Taxing District, supra,* with *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1; see *Howe Machine Co.* v. *Gage, supra; Wagner* v. *Covington, supra;* and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case."

The next decision by this Court on this subject was *Nippert* vs. *City of Richmond,* 327 U. S. 416 (1946), wherein the Court struck down a city license ordinance applied to agents and solicitors operating from house-to-house insofar as they were engaged in interstate commerce. The City of Richmond relied principally upon the decision in the *Berwind-White* case to support the claim of validity of its ordinance, despite the fact that the court in that case, as quoted above, reviewed the drummer cases, distinguished its decision and followed the rule in *Robbins* vs. *Shelby* insofar as fixed sum license taxes are concerned.

In *Nippert* vs. *Richmond, supra,* this Court in a footnote said in part:

> "As there stated, in the Shelby case the court was cognizant of the rapidly growing tendency of states and municipalities to lay license taxes upon drummers 'for the purpose of embarrassing this competition with local merchants', and following the Shelby County decision nineteen such taxes were held invalid."

In these and similar cases, this Court not only has looked at the effect and operation of the legislation but has recognized and mentioned the motive.

Taxation is not the only form of burden which can be wrongfully imposed upon the free flow of interstate commerce. Burdens which have the same effect as taxation, i. e., discrimination, prohibition, reduction or regulation of such commerce, are no more valid than non-permissible taxation when in a form other than that of taxation.

The type of ordinance now before the Court operates as a practical prohibition of such commerce and attempts to set up conditions precedent upon the right to enter and carry on commerce, which right flows from the Federal Constitution and not from the states. That it is a prohibition and that that is its purpose is conceded by sponsors and those whose sympathies are with the sponsors' interests.

Attention is invited to extracts from the language of an article by Mr. Ambrose Fuller dated October, 1938, under the title, "The Validity of The Green River Ordinance", mimeographed and issued by American Municipal Association, 1313 East 60th Street, Chicago, Illinois, as its Report No. 125, wherein Mr. Fuller says in part as follows:

> "The so-called Green River ordinance has had a truly phenomenal growth since it was first publicized

by court litigation in 1934. Signs at the corporate limits of many cities and villages throughout the country announce the adoption and enforcement of its restrictions. News notes in league magazines and bulletins from all parts of the country announce its adoption in new places. Apparently the *prohibitory* methods of that legislation are growing in popularity over the *regulatory* methods previously employed to control transient vendors of various sorts." • • •

"The Green River ordinance imposes a *harsh remedy* to a vexatious perennial problem." • • •

"The *former method of procedure was to impose a license and certain regulations upon peddlers,* who are usually defined as transient vendors who carry their goods about with them and make completed sales at retail and deliver the goods sold in one transaction. Similar regulations, and sometimes also the payment of property taxes where that has not previously been paid, were imposed upon persons as transient merchants who occupied temporary quarters with merchandise for the purpose of selling the same at retail. Because of lack of statutory and charter authority, these regulatory methods have seldom been extended to *canvassers* and *solicitors* who take orders for goods for subsequent delivery and who constitute a *major portion of* the *transient or itinerant vendor problem.* Indeed, these activities are usually found, or at least *claimed, to be interstate commerce* and consequently *protected from control or interference* by states or their subdivisions. Robbins *v.* Shelby County Taxing District, 120 U. S. 49; Crenshaw *v.* Arkansas, 227 U. S. 390; Real Silk Hosiery Mills *v.* Portland, 228 U. S. 325.

"The Green River ordinance on the other hand, proceeds by *prohibiting* all house to house selling or soliciting without an invitation from the occupant of private premises. The *restriction is sweeping and all inclusive and has been grasped at because of the*

failure of regulatory methods to satisfy local officials or their constituents." • • • (Italics supplied.)

It is difficult to find any reason why the rule in respect to taxation of interstate commerce established in the *Robbins* case, somewhat limited in the *McGoldrick-Berwind-White* case, and affirmed in the *Nippert* case, is not applicable to burdens other than taxation which have effects upon commerce that are no less objectionable than the burden of taxation. No difference can be found between the effect of a fixed sum license tax and the effect of the ordinance here involved. Had this Court upheld the license and bond type of ordinance of the City of Portland when it was before it in 1925, the nuisance type of ordinance would never have been designed to take its place. Upon the theory that there are many ways of "skinning the cat" rests the origin of this newer form of burden.

The case of *Hood & Sons* vs. *DuMond*, 336 U. S. 525, concerned the power of the State of New York to deny additional facilities to acquire and ship milk in interstate commerce, where denial was based upon the claim that the expansion of petitioner's facilities would reduce the supply of milk for local markets and would result in destructive competition in a market already adequately served. The New York law thus applied was held by this Court (April 4, 1949) to violate the commerce clause of the Federal Constitution.

In this case at page 531 the Court, in referring to the case of *Baldwin* v. *Seelig*, 294 U. S. 511, said:

> "It recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce. But it laid re-

peated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce.

The Constitution, said Mr. Justice Cardozo for the unanimous Court, 'was framed upon the theory that the peoples of several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' He reiterated that the economic objective, as distinguished from any health, safety and fair-dealing purpose of the regulation, was the root of its invalidity. The action of the State would 'neutralize the economic consequences of free trade among the states.' 'Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.' 'If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.' And again, 'Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result.'

This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such

commerce for their economic advantage, is one deeply rooted in both our history and our law."

The language above quoted is quite pat in application to the ordinance now under consideration. Neither a state nor any subdivision thereof may promote its own economic advantage by the curtailment or burdening of interstate commerce. Such enactments are definitely barriers to traffic between the states.

The Court here made no distinction between the power to tax and the police power as instruments for creating economic barriers. It plainly pointed out that the police power may not be unnecessarily invoked to retard, burden or constrict the flow of such commerce.

In the *Hood* case the economic motive or design was admitted and it was not necessary in that instance for the Court to search it out.

Now comes the decision of this Court in the case of *Dean Milk Company* v. *City of Madison, Wisconsin, et al.*, 71 S. Ct. 295 (January 15, 1951), wherein the economic purpose motive, as distinguished from a welfare purpose, was not even present. The case concerned a provision making it unlawful in Madison to sell milk as pasteurized unless processed and bottled at a pasteurization plant within a radius of five miles from the central square in the city. Also another provision indirectly prohibited the sale of milk in Madison from a source of supply located beyond twenty-five miles from the center of the city. Both of these provisions were stricken down by the Court under the commerce clause of the United States Constitution. The practical effect of the ordinance excluded from distribution in Madison wholesome milk produced and pasteurized in Illinois and the Court said at page 298:

> "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives adequate to conserve legitimate local interests, are available. Cf. *Baldwin* v. *Seelig, supra,* at 524; *Minnesota* v. *Barber,* 136 U. S. 313, 328 (1890). A different view that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instances where a state artlessly discloses an avowed purpose to discriminate against interstate goods. Cf. *H. P. Hood & Sons* v. *DuMond, supra* . . . ."

The Court noted the availability of reasonable and adequate alternatives and pointed them out.

Had the purpose of the ordinance now before the Court been to regulate rather than to prohibit, it is clear that as in the *Dean* case, there are reasonable alternatives readily available which would accomplish the regulatory purposes claimed for the ordinance without prohibiting and impeding the free flow of commerce.

Upon the strained theme that calling upon householders constitutes a trespass and that such calls made upon numerous people might constitute an invasion of the rights of the householders to the extent of a public offense, then a more reasonable type of regulation could take the form of an enactment prohibiting the making of calls upon premises posted against the same. An ordinance of this kind based upon the idea of common law trespass came before a United States District Court in California April

24, 1924 in the case of *Real Silk Hosiery Mills* v. *City of Richmond*, 298 Fed. 126, wherein the court supported the validity of the ordinance and its application to persons specifically named in the posting as being prohibited, but said that the ordinance was ineffective as against persons or classes of persons not specifically covered in the posting, upon the theory that those whom the householders did not ban could not be banned by city ordinance, stating at page 127:

> "Where the householders permit solicitors the city cannot forbid."

At the same page the court further said:

> "Hence application of the ordinance to plaintiff's solicitors (solicitors not being banned by the posted notice) is unwarranted interference with interstate commerce, and deprivation of liberty of contract and of property without due process of law."

The posting method of handling the situation, which would be entirely satisfactory to householders who wanted to ban these calls, is not sufficiently drastic to meet the desires of those interested in prohibiting the business—the convenience, comfort or desires of the householder actually being considered of no relevance to the subject matter.

Other legislative means of a reasonable nature either are in existence or could be devised without setting up an unwarranted local economic advantage.

The householder may avail himself of his right merely to refuse to receive the caller by denying a sales interview, and of his rights in criminal trespass. As in any area of business he has the protection of existing laws against fraud and dishonest dealing.

The ordinance, as in this case and as typically written, is not applied to persons coming on the premises for reasons other than soliciting orders, such as meter readers, retail delivery services and other business occasions. Accordingly, since all others may call, the ordinance is non-effective as a deterrent to designing criminals seeking access, information or victims.

In the two milk decisions (*Hood* vs. *DuMond* and *Dean* vs. *City of Madison*) this Court reached its determinations on the basis of the practical effect of the legislation involved. In both cases the Court acted free and independent of the state decisions. In *Hood* vs. *DuMond* an unwarranted economic motive was "artlessly admitted". In the *Dean* case there seemed to be no such motive. Both cases involved an important area of health and welfare. Certainly in no other field are the welfare factors more prominent than in the distribution of milk, a major food commodity and one that might easily become contaminated.

In the case at bar the proponents of the legislation make no "artless admissions". On the contrary they make artful denials of an economic motive.

This brief has gone at length to show history, background and practical effect of this type of legislation in this area of business, an area in which there is no substantial welfare factor involved. It is, therefore, respectfully urged that this Court look at this ordinance for what it really is—an economic weapon professing to be a welfare measure, but one that in practical effect prohibits the free flow of commerce.

Going back to the *Dean* decision, it is to be noted that the Court applied the same principles in protecting the free flow of commerce as had been earlier applied in protecting the freedoms of speech, press and religion.

The decision of this Court in the case of *Martin* vs. *Struthers*, 319 U. S. 141 (1943), involved a fact situation so comparable with that now before the Court that the language of the decision need be modified only in the slightest degree to indicate the basis upon which the Court is urged to strike down the Green River type ordinance. In paraphrasing *Struthers* (page 146), the substitute language is italicized and the *Struthers* language is shown in parentheses:

> "Freedom to distribute (information) *merchandise* to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free (society) *exchange of goods* that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the (dissemination of ideas) *free flow of commerce.*"

Just one week before date of decision in the *Dean* case this Court said in *Standard Oil Company* v. *Federal Trade Commission*, 71 S. Ct. 240 (1951), at page 249:

> "The heart of our national economic policy long has been faith in the value of competition."

In this type of legislation no thought seems to have been given to the right of the consumer to choose with whom he may deal or to select the market in which he may make his purchases. Freedom of the consumer in this respect is one of the foundation stones of competition. Where opportunities for the buyer are hindered or prevented, competi-

tion suffers and along with it the purchaser. It is a matter of common knowledge that competition between intrastate and interstate commerce is, from the standpoint of the consumer, a matter of great desirability.

It has been the purpose in this section of the brief to show how effectively this type of ordinance operates in a practical sense to prohibit the flow of commerce among the several states. If it were the objective of this type of ordinance to subject commerce to reasonable regulations, truly intended and designed to protect the welfare of the community (as distinguished from the purpose to create competitive advantage), there are, as noted above, reasonable alternatives available which would adequately accomplish that object—thus leaving this useful and traditional method of distribution free to continue to serve those who by their continued patronage have indicated their desire to have their needs filled through this source of supply.

Due Process.

It is urged to the Court that the ordinance involved in this case is violative of the due process clause of the United States Constitution in that it deprives the appellant of the right to engage in a legitimate and useful calling; in that it is palpably arbitrary and unreasonable; in that it has no relation to the protection of public safety, health or welfare, but rather is designed and operates solely to protect local trade from competition.

A reading of the due process cases discloses that there has been a pronounced shift in the views of the Supreme Court in this field beginning at least as early as 1934 with the case of *Nebbia* vs. *New York*, 291 U. S. 502. Thus it is clear that the decisions in many of the earlier cases must be applied with caution.

In the *Nebbia* case, which has frequently been referred to as being the foundation for the current views of the Court, it said at page 525:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulations for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Among the most recent decisions of this Court under the due process clause of the Constitution are the cases of *Railway Express Company* vs. *New York*, 336 U. S. 106 (1949), and *Daniel, Attorney-General, et al.* vs. *Family Security Life Insurance Company*, 336 U. S. 220 (1949).

While the decisions in both of these cases upheld the validity of the legislation considered, it is clear that the Court entertains no doubt as to its right and obligation to strike down local legislation which is palpably arbitrary and unreasonable.

In *Railway Express Company* vs. *New York*, 336 U. S. 106 (1949), concerning the validity of an ordinance which prohibited the operation of any advertising vehicle on the streets, but excepted vehicles which have upon them busi-

ness notices or advertisements of the products of the owner and which are not used merely or mainly for advertising, the Court refused to strike down the ordinance, saying at page 109:

> "We would be trespassing on one of the most intensely local and highly specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced that shows it to be *palpably* false." (Emphasis added.)

Attention was called to the fact that the Court in *Fifth Avenue Coach Company* vs. *New York*, 221 U. S. 467 (1911), a pre-*Nebbia* decision case, sustained the predecessor ordinance of New York City to its present regulation over the objection that it violated due process and equal protection clauses of the Fourteenth Amendment. In both cases the presence of a genuine police purpose was found and certainly the regulation of the traffic problem in densely populated areas is about as close to the public welfare as any type of local regulation. In neither of these cases can there be found any palpable example of deprivation of due process.

In the *Daniel* case previously referred to, this Court commented upon prior decisions in the due process field and at Page 225 discloses that the shift in view point with respect to due process has been one of emphasis rather than one of basic principle. The case was concerned with the validity of a South Carolina statute which prohibited life insurance companies and their agents from engaging in the undertaking business and prohibited undertakers from serving as agents for life insurance companies. The Court

refused to strike down the legislation, since the evidence in that case showed the existence of abuses which arose from the prohibited relationship between undertakers and the insurance business. Thus the Court concluded that the statute had a direct tendency to eliminate the evils at which it was directed.

Reference was made in this case *(Daniel)* to *Liggett Company* vs. *Baldridge*, 278 U. S. 105 (1928), a pre-*Nebbia* decision. After reviewing the facts which disclosed that the statute there in question required all stockholders of drugstore corporations to be pharmacists, the Court said at page 225:

> "The Liggett Case on its facts is not authority for the invalidation of the South Carolina Mortuary Act."

It is implicit that the Court in thus distinguishing between the factual situation involved in the *Liggett* case and in the *Daniel* case indicated that the decision in the *Liggett* case would have been today as it was in 1928 when the decision was handed down.

The fact situations involved in these post-*Nebbia* due process decisions where the Court refused to strike down local legislation show an absence of palpably unreasonable or arbitrary legislative action.

Since the present view of the Court is that the reasonableness of each regulation depends upon the relevant facts, consideration must be given to the facts in the case now before the Court to determine whether the action of the municipal authorities in adopting the ordinance at issue was palpably arbitrary and unreasonable.

No useful purpose would be served by repeating the facts which have been heretofore set out with respect to this ordinance. No one can doubt that its intended purpose,

operation and practical effect is to destroy a recognized and useful method of distribution and if broadly enforced would deprive literally millions of people of this means of livelihood or augmentation of an otherwise insufficient living income.

It undoubtedly will be argued that appellant's remedy lies with the city council rather than with the courts. This, however, overlooks the undebatable fact that these ordinances are universally sponsored and adopted in communities where the legislative dominance of local retailing is at its highest level.

In view of the unique circumstances here involved, it seems manifest that an ordinance of this kind which would necessarily result in the complete elimination of one entire method of distribution would be considered as a denial of the protection intended to be conferred by the due process clause.

Conclusion.

National Association of Direct Selling Companies, Inc., as *amicus curiae*, respectfully urges the court to reverse the judgment appealed from.

Respectfully submitted,

J. M. Gronon,
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